

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 28-90:

TEAMSTERS LOCAL UNION NO. 190,)

Complainant,)

-VS-

YELLOWSTONE COUNTY,)

Defendant.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND
RECOMMENDED ORDER

* * * * *

1. INTRODUCTION

A formal hearing in the above-entitled matter was conducted November 20, 1991, in Billings, Montana before Stan Gerke, Hearing Examiner. The hearing was conducted under the authority of Section 39-31-406 MCA and in accordance with the Montana Administrative Procedures Act, Title 2, Chapter 4, MCA. The Complainant, Teamsters Local Union No. 190, was represented by D. Patrick McKittrick, Attorney at Law, Great Falls, Montana. The Defendant, Yellowstone County, was represented by David W. Hoefer, Deputy County Attorney, Yellowstone County, Billings, Montana. Witnesses included Chuck Benboe, Business Agent, Teamsters Local Union No. 190, James E. Waldo, Secretary-Treasurer, Teamsters Local Union 190, and Jim Logan, Yellowstone County Surveyor. Subsequent to the hearing, the Parties submitted post-hearing briefs.

1 II. ISSUE

2 Whether the Defendant has violated Section 39-31-401(5) MCA by
3 its action of unilaterally altering the terms and conditions of
4 employment.

5 III. FINDINGS OF FACT

6 1. The Complainant, Teamsters Local Union No. 190, is the
7 exclusive collective bargaining representative for certain
8 employees of the Defendant, Yellowstone County, defined as "...all
9 non-exempt, full time, permanent employees of the Yellowstone
10 County Road and Bridge Department, except the Road Superintendent
11 and the Shop Superintendent." (Joint Exhibit No. 1 - Collective
12 Bargaining Agreement between Yellowstone County and Teamsters Local
13 Union No. 190, July 1, 1990 - June 30, 1992).

14 2. A collective bargaining agreement (Joint Exhibit No. 1 -
15 described above) presently exists between the Complainant and
16 Defendant and has existed for a number of years.

17 3. Article V - Compensation of the existing collective
18 bargaining agreement between the Parties indicates the salary
19 schedules for the various categories of positions covered by the
20 agreement:

ARTICLE V - COMPENSATION

Section 1. Wages:

Subd. 1. Yellowstone County Road and Bridge Category
Schedule:

Category	7/1/90	7/1/91
Probationary Yardman (90 days)	\$ 8.17	\$ 8.42
Yardman	\$ 8.58	\$ 8.84
Truck Drivers	\$11.23	\$11.57
Bridge Helper	\$11.49	\$11.83
Equipment Operator I*	\$11.81	\$12.16
Shop Clerk	\$ 7.18	\$ 7.40
Utility Man	\$12.02	\$12.38
Equipment Operator II**	\$12.07	\$12.43
Dozer & Scraper	\$12.15	\$12.51
Mechanic, Welder	\$12.20	\$12.57
Backhoe & Crane Operator	\$12.20	\$12.57*
Foreman (Bridge & Road)	\$12.71	\$13.09

* Equipment Operator I includes: signman, roller, packer, water truck, power broom, air compressor, roto-tiller, mower and any other equipment or machinery requiring other training or responsibility above and beyond that required for truck driving and not included in a higher salary scale classification, including pulling pups.

**Equipment Operator II includes: motor patrol, front end loader.

***If a truck driver is assigned to pull a pup during the first half of his/her shift, he/she shall be paid for 1/2 of the shift for pulling the pup. If at any time during the second half of the shift, he/she is directed to pull a pup, then he/she shall receive pay for the entire second half of the shift.

*Emphasis added

1 Additionally, Article V - Compensation indicates the methods
2 and procedures by which employees are to be compensated while
3 working within or out of their respective assigned classifications:

4 Section 2. Each employee shall be paid according to his
5 classification in the above schedule.

6 Subd. 1. In cases where individuals are assigned to
7 temporary work in a higher classification, they shall be
8 paid for the higher classification only for the number of
9 hours worked in that classification. In cases where
10 individuals are assigned to temporary work in a higher
11 paying classification for a continuous extended period of
12 time, after 90 days they shall be paid for all
13 compensable hours beyond the 90 days while in that
14 assignment at the higher rate of pay. There shall be no
15 duplication or pyramiding in these situations.

16 Subd. 2. In cases where individuals are assigned
17 temporary work in a lower classification, they shall be
18 paid according to their permanent salary scale.

19 Subd. 3. No employee shall be reduced in classification
20 or salary except of his/her own choice or in the case of
21 demotion resulting from discredit of himself.

22 Contained within Article V - Compensation under Section 7 -
23 Seniority, part (c), are the provisions relating to the promotion
24 of employees from one classification to another:

25 (c) The employer shall recognize seniority within
 the Road and Bridge Department and qualifications
 in awarding promotions to the employees when
 filling newly created or vacated positions. Where
 qualifications are equal, seniority shall prevail.
 It is the intention of the parties to this
 Agreement that the employer shall grant preference

1 to persons already in employment. All job openings
2 in the Department shall be posted with a copy to
3 the Union. When an existing employee is promoted
4 to another job, he will be deemed permanent and
5 elevated to the rate of pay immediately and be on
6 probation for three (3) months. A final decision
7 as to qualifications shall rest with the County
8 Surveyor. (Emphasis added)

9 Additionally, Section 7 - Seniority, part (d)(2) of Article V
10 - Compensation provides:

11 2) An employee whose position is to be abolished
12 and who has more seniority than an employee in
13 another job classification, may replace that
14 employee provided he meets the minimum occupational
15 qualifications. This qualification shall be
16 determined by the County Surveyor. (Emphasis
17 added)

18 4. The designated bridge crew consisted of three employees -
19 Bridge Foreman (Bob Moats), Backhoe and Crane Operator (Lester
20 Palin), and Bridge Helper (Mike Makin). All three classifications
21 are listed under Article V - Compensation, Section 1 - Wages,
22 Subsection 1 - Yellowstone County Road and Bridge Category
23 Schedule, of the collective bargaining agreement.

24 5. Sometime in 1987, Bob Moats removed himself as Bridge
25 Foreman and began operating a motor patrol under the classification
of Equipment Operator II. Lester Palin was promoted to Bridge
Foreman leaving the Backhoe and Crane Operator position vacant.
The Defendant then began assigning the Bridge Foreman or the Bridge
Helper to fill the Backhoe and Crane Operator position on a
temporary basis.

1 6. The Complainant complained on various occasions to the
2 Defendant concerning the non-permanent filling of the Backhoe and
3 Crane Operator position and the temporary use of seasonal employees
4 (Bridge Helper) to fill the position alleging violation of the
5 collective bargaining agreement. No resolution of the matter was
6 reached.

7 7. On September 5, 1990, the Complainant filed a formal
8 grievance with the Defendant pursuant to Article VIII - Grievance
9 Procedure contained in the collective bargaining agreement. The
10 grievance alleged ongoing violation of the collective bargaining
11 agreement pertaining to the Defendant's refusal to job post and
12 fill the vacant Backhoe and Crane Operator position and using less
13 senior employees to temporarily fill the position.

14 8. On or about December 3, 1990, Mr. James E. Waldo,
15 Secretary-Treasurer, and Chuck Benboe, Business Agent, of the
16 Teamsters Local Union No. 190 (Complainant) met with Jim Logan,
17 Yellowstone County Surveyor (Defendant) to discuss the grievance.
18 The Complainant was informed that the Defendant had elected to
19 merge the positions of Bridge Foreman and Backhoe and Crane
20 Operator into one position.

21 9. On December 7, 1990, the Complainant filed an unfair
22 labor practice charge with this Board alleging the Defendant had
23 violated Section 39-31-401(5) MCA by its action of unilaterally
24 altering the terms and conditions of employment.

1 IV. DISCUSSION

2 The various portions of the collective bargaining agreement
3 (see Findings of Fact No. 3) collaborate to show the intent and
4 purpose of the agreement. The language clearly indicates that
5 employees are classified into certain categories/pay scales
6 (Article V - Compensation, Section 1 - Wages, Subsection 1);
7 conditions are established for modified pay when employees work
8 outside their assigned classification (Section 2, Subsections 1 and
9 2); restrictions on wages are imposed regarding the demotion or
10 reduction of employees from one classification to another (Section
11 2, Subsection 3); provisions are established for the filling of
12 newly created or vacated positions (Section 7, part (c)); and,
13 "bumping" of employees from their classifications is allowed in
14 cases of abolished positions (Section 7, part [d][2]). Great
15 emphasis is given to seniority in the collective bargaining
16 agreement relating to these employee rights.

17 The Defendant argues that it decided to merge the Backhoe and
18 Crane Operator position with the Bridge Foreman position for
19 financial reasons. Further, the Defendant argues it had the
20 unilateral right to do so pursuant to the collective bargaining
21 agreement pursuant to Article IV - County Rights, Section 2 -
22 Management Responsibilities:

23 Section 2. Management Responsibilities: The parties
24 recognize the right and obligation of the County to
25 efficiently manage and conduct the operation of the

1 County within its legal limitations according to 39-31-
2 303, MCA, which states:

3 Public employees and their representatives
4 shall recognize the prerogative of public
5 employers to operate and manage their affairs
6 in such areas as, but not limited to:

- 7 1) direct employees;
- 8 2) hire, promote, transfer, assign, and
9 retain employees;
- 10 3) relieve employees from duties because of
11 lack of work or funds or under conditions
12 where continuation of such work would be
13 inefficient and nonproductive;
- 14 4) maintain the efficiency of government
15 operations;
- 16 5) determine the methods, means, job
17 classifications, and personnel by which
government operations are to be
conducted;
- 6) take whatever actions may be necessary to
carry out the missions of the agency in
situations of emergency;
- 7) establish the methods and processes by
which work is performed.

18 The Defendant also cites Section 4 of the same Article:

19 Section 4. Rights of County Surveyor: The County
20 Surveyor retains the right under Section 7-4-2812(2)(i),
21 MCA, to "employ deputies, men and teams and discharge at
22 his pleasure such deputies, men and teams and determine
23 how, when and where such deputies, men and teams shall
24 work."

25 However, the Defendant's rights are conditioned by the
collective bargaining agreement in the same Article as cited above:

1 Section 3. Effective Laws, Rules and Regulations: The
2 parties recognize the right, obligations and duty of the
3 County, and its duly designated officials to promulgate
4 rules, regulations, directives and orders from time to
5 time as deemed necessary insofar as such rules,
6 regulations, directives and orders are not inconsistent
7 with terms of this Agreement, and all terms of this
8 Agreement are subject to the laws of the State of
9 Montana, federal laws, and valid rules, regulations and
10 orders of state and federal governmental agencies. Any
11 provision of this Agreement found to be in violation of
any such laws, rules, regulations, directives, and
orders, shall be null and void and without force and
effect. (Emphasis added)

12 The Montana Supreme Court has approved the practice of the
13 Board of Personnel Appeals in using federal court and National
14 Labor Relations Board (NLRB) precedence as guidelines interpreting
15 the Montana Collective Bargaining for Public Employees Act as the
16 State Act is so similar to the Federal Labor Management Relations
17 Act, State ex rel Board of Personnel Appeals v. District Court, 183
18 Mont. 223 (1979), 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No.
19 45 v. State ex rel Board of Personnel Appeals, 195 Mont. 272 (1981)
20 635 P.2d 1310, 110 LRRM 2012; City of Great Falls v. Young (III),
21 686 P.2d 185 (1984) 199 LRRM 2682.

22 It is well settled that unilateral changes in mandatory
23 subjects of bargaining by an employer is an unfair labor practice
24 (violation of Section 8(a)(5) of the NLRA which is the Federal
25 counterpart of Section 39-31-401(5) MCA). See NLRB v. Katz, 396

1 U.S. 736, 50 LRRM 2177 (1962). In this matter the Defendant
2 unilaterally abolished the Backhoe and Crane Operator position from
3 the classification matrix. The abolished position, in review of
4 the collective bargaining agreement, represents a significant
5 promotion or advancement level for covered employees.

6 To determine which subjects are mandatory subjects of the
7 bargaining this Board has utilized the balancing test adopted by
8 the Kansas Supreme Court in 1973 (N.E.A. v. Shawnee Mission Board
9 of Education, 512 P.2d 426, 84 LRRM 2223) and followed by the
10 Pennsylvania Supreme Court (Pennsylvania Labor Relations Board v.
11 State College Area School District, 337 A.2d 262, 90 LRRM 2081).

12 The Kansas Supreme Court said:

13 It does little good, we think, to speak in terms of
14 "policy" versus something which is not policy. Salaries
15 are a matter of policy, and so are vacation and sick
16 leaves. Yet we cannot doubt the authority of the Board
17 to negotiate and bind itself on these questions. The
18 key, as we see it, is how direct the impact of an issue
19 is on the well-being of the individual teacher, as
20 opposed to its effect on the operation of the school
21 system as a whole. (Emphasis added) The line may be
22 hard to draw, but in the absence of more assistance from
23 the legislature the courts must do the best they can.

24 The similar phraseology of the N.L.R.A. has had a similar
25 history of judicial definition. See Fibreboard
26 Corporation v. Labor Board, 379 U.S. 203, 13 L.ED. 2d
27 233, 85 S. Ct. 398, 57 LRRM 2609 and especially the
28 concurring opinion of Steward, J. at pp. 221-222.

29 See also ULP #5-77, Florence-Carlton Unit of the Montana
30 Education Association v. McCone County School District #1.

1 The subjects of wages, hours, and working conditions represent
2 the foundation of all collective bargaining. The impact of wages
3 on employees is ultimate. The placement of employees on any pay
4 plan or matrix must be negotiable. Likewise, opportunities for
5 advancement or promotion are equally negotiable. Considerations
6 for the effect on the employer's operations must be set aside.

7 V. CONCLUSIONS OF LAW

8 1. The Board of Personnel Appeals has jurisdiction in these
9 matters pursuant to Section 39-31-405 et seq. MCA.

10 2. The Defendant violated Section 39-31-401(5) MCA by its
11 action of unilaterally altering a mandatory subject of bargaining.

12 VI. RECOMMENDED ORDER

13 1. The Defendant, Yellowstone County shall reinstate the
14 position of Backhoe and Crane Operator and maintain and utilize
15 such position pursuant to the terms and conditions of the existing
16 collective bargaining agreement until such time good faith
17 bargaining may alter the conditions of said position.

18 2. The Defendant shall cease and desist from unilaterally
19 altering the terms and conditions of employment.

20 DATED this 27th day of March, 1992.

21
22 By:


23 STAN GERKE
24 Hearing Examiner
25